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To: Transport Industry Operators

Fraud vis-à vis summary judgment

The Hong Kong High Court issued a Judgment on 18/11/2016 dismissing a shipping company's application for summary judgment against its former deputy general manager (Mr Ma) for restitution of the sum of HK\$387,655,303.70 on the ground of money had and received and/or unjust enrichment. [HCA 619/2016]

Background

Mr Ma first joined the shipping company as an accounts clerk in 1992. By 2002 he was promoted to the post of deputy accounting manager. He was further promoted to the posts of accounting manager in 2005 and deputy general manager in 2011. He was summarily dismissed on 4/3/2016.

In or around 2003, the shipping company entrusted Mr Ma with duties and powers to operate online the shipping company's bank accounts for the sole purpose of the business of the shipping company. Mr Ma was given the passwords and safety devices to operate the shipping company's bank accounts online.

The shipping company pleaded that on divers dates between 2009 to 2016 Mr Ma had:

- (1) in breach of the implied employment term of fidelity; and/or
- (2) in breach of the fiduciary duties; and/or
- (3) in breach of confidence and converted the safety device(s) to his own use; and/or
- (4) without authority, knowledge, consent, cause and/or consideration, unlawfully and/or wrongfully transferred online money of the shipping company from the shipping company's accounts a total sum of HK\$387,655,303.70 to Mr Ma's accounts.

By the summons, the shipping company sought to obtain summary judgment against Mr Ma for restitution of the said sum of HK\$387,655,303.70 on the ground of money had and received and/or unjust enrichment.

Jurisdiction

An application by a plaintiff for summary judgment is governed by Order 14, rule 1 of the RHC.

By Order 14, rule 1(2) it is provided that:

"Subject to paragraph (3) this rule applies to every action begun by writ other than–

- (a) ...,
- (b) an action which includes a claim by the plaintiff based on an allegation of fraud ..."

In *Pacific Electric Wire & Cable Co Ltd v Harmutty Ltd* [2009] 3 HKLRD 94 the Court of Appeal (Rogers VP and Le Pichon JA) held that Order 14, rule 1(2)(b) excluded from summary judgment proceedings an action where one claim included in the writ was based on an allegation of fraud. First, Order 14, rule 1(2)(b) applied to exclude summary judgment proceedings where one claim but not another was based on an allegation of fraud. Second, the rule was not confined to excluding actions in which there was a claim for damages for fraud; what was excluded was any action where there was a

claim in respect of which the underlying allegations on which the claim was based constituted an allegation of fraud.

As Rogers VP said at para 19:

“It is clear that if r.1(2)(b) applies there is no jurisdiction for the court to entertain an application for summary judgment.”

Rogers VP said at para 31:

“... although the claims made in the case may be framed in respect of constructive trust, resulting trust and money had and received, the claims in the action are based on allegations of fraud that include deliberate dishonesty. As is pointed out in *Bullen & Leake & Jacob's Precedents of Pleadings* (16th ed., 2008) Vol.2, p.841, an action in fraud will usually include one or more of a number of distinct causes of action amongst which are listed ‘money had and received’ and ‘constructive trusts: knowing receipt and dishonest assistance’. Furthermore, as Mr Whitehead SC, who appeared for Mr Hu, pointed out, in paras.18-07 and 18-08 of *Clerk & Lindsell on Torts* (19th ed., 2006) and the third supplement thereto, it is made quite clear that active non-verbal conduct can amount to deceit. In this case, the allegations of the concealment of facts from the plaintiff when there was a duty to disclose, and the connivance at the preparation of false financial statements and accounts would be clear allegations of fraud.”

In *A-1 Business Ltd v Chau Cham Wong Patrick* [2009] 5 HKLRD 579 it was held by the Court of Appeal (Cheung and Yuen JJA) that the plaintiff's claim was caught by the exclusion rule in Order 14, rule 1(2)(b). The plaintiff brought an action against its directors for breach of fiduciary duties by the misappropriation of assets, including a transfer by the first defendant of sums of money in sale proceeds from the plaintiff's account to his own account (“the transfer”) to reduce his indebtedness in respect of a personal loan. It was held that regarding the plaintiff's claim, although a claim based on breach of fiduciary duty resulting in a duty to account might not necessarily involve dishonesty, each case depended on its own facts. In that case, the plaintiff's claim based on misappropriation and its response to the defence that the transfer to the first defendant was for a legitimate purpose, involved allegations of dishonesty and fraudulent conduct by the defendants.

As Cheung JA said at para 15:

“I agree with the Judge that the plaintiff's claim based on misappropriation cannot be viewed in isolation and divorced from the plaintiff's response to the defence that the transfer was for a legitimate purpose. In order to establish that the transfer was a misappropriation of the plaintiff's assets, the plaintiff clearly has to address the defence and this clearly will involve an allegation of dishonesty on the part of the defendants. In substance, allegations of fraudulent conduct are involved in the plaintiff's claim and this is caught by the exclusion rule.”

In *Zimmer Sweden AB v KPN Hong Kong Ltd* [2016] 1 HKLRD 1016 the Court of Appeal (Lam VP, Yuen and Kwan JJA) held that the court should determine whether “the fraud exception” applied at the time when the application for summary judgment is heard. The court should not be restricted to a consideration of the statement of claim only, but should examine all relevant materials existing at the time of the hearing, including subsequent pleadings and affidavits (Yuen JA at para 18(1)).

In dealing with the “narrow” meaning and the “wide/liberal” meaning of “the fraud exception” at paras 11.1 to 12.2 of her judgment, Yuen JA said at paras 12.1 and 12.2:

“The ‘wide/liberal’ meaning adopted by the Hong Kong courts

- 12.1. Unlike the Administration of Justice (Miscellaneous Provisions) Act of 1933 discussed above, in Hong Kong an allegation of fraud does not entitle a party to a trial by jury (see s.33A of the High Court Ordinance (Cap.4)). Accordingly, there was no need to apply a narrow meaning for the sake of consistency with the provision for civil trials by jury.
- 12.2. As will be seen later, the courts in Hong Kong have adopted a wide or liberal meaning of the ‘fraud exception’. In other words, if the action included a claim based on an allegation of fraudulent conduct, the courts have held that O.14 did not apply. This is consistent with Nicholls LJ's observation in *Newton* that ‘as a matter of first impression, [the fraud] exception seems apt to embrace cases where dishonesty is alleged against a defendant’, before he held that in England, the courts were bound by authorities to adopt a narrow meaning.”

And at para 18(6) Yuen JA said:

“... as to what is an allegation of fraud for the purpose of ‘the fraud exception’, this Court is bound by the judgment in *Pacific Electric Wire* to adopt the wide/liberal meaning. To conclude, ‘the fraud exception’ would be engaged where what is alleged is an intentional or reckless dishonest act (or omission) done with the purpose of deceiving.”

Lam VP and Kwan JA agreed with the judgment of Yuen JA.

As was held in *Zimmer*, Hong Kong courts have adopted a wide/liberal meaning of the fraud exception, namely it would be engaged where what was alleged was an intentional or reckless dishonest act (or omission) done with the purpose of deceiving.

The shipping company submitted that by the summons the shipping company was seeking to obtain summary judgment for its claim under para 8(4) of the amended statement of claim (“ASC”) and that there was no allegation of fraud. The shipping company made it plain that the shipping company was not abandoning its other claims against Mr Ma under para 8 of the ASC but that for the purposes of the application for summary judgment, the shipping company was only relying on the cause of action for money had and received under para 8(4) of the ASC.

It was important to see what were the underlying allegations made by the shipping company in the action in question.

The writ was issued on 10/3/2016. On the same day, on the *ex parte* application of the shipping company, supported by the 1st affidavit of Mr Park, the general manager and a director of the shipping company, Anthony Chan J granted a *Mareva* injunction to the shipping company against Mr Ma prohibiting the disposal of the assets of Mr Ma up to the value of HK\$322,345,743.00 which included monies in the bank accounts and the landed properties. Orders were also made at the same time for disclosure of information by Mr Ma and by his banks.

The evidence of Mr Park in his 1st affidavit was that in about late 2015, the shipping company’s parent company in Korea received complaints from one of its service providers, Hong Kong International Terminal Ltd, that there were discrepancies between their accounts and that some of the invoices were unsettled for years. This led to a review of the account books of the parent company against those of the service provider as a result of which Mr Park noticed that there was a huge discrepancy on the amount of payables of the parent company and the amount of receivables of its service providers. Mr Park, however, was unable to find the reason for the discrepancies.

This led to Mr Kim, the general manager of the parent company, and Mr Park coming to Hong Kong to investigate the matter in February 2016. On 29/2/2016 they discovered that some suspicious transactions were not supported by documents. They were shocked to discover that Mr Ma’s name was shown on the bank statements of the shipping company’s accounts as the recipient or beneficiary for a number of transactions. According to Mr Park, he immediately summoned Mr Ma and asked for an explanation at which time Mr Ma confessed that he had been misappropriating the funds of the shipping company. There was another meeting on the same day in Mr Kim’s hotel room when Mr Ma again confessed that over the years he had been misappropriating the shipping company’s funds in the total sum of HK\$76 million by transferring the same to his personal bank accounts.

At the time of the 1st affidavit, the shipping company had ascertained that during the period between September 2011 and February 2016 there were altogether 211 unauthorised/unlawful and wrongful transfers made by Mr Ma from the shipping company’s bank account to Mr Ma’s bank accounts. Mr Park in his 1st affidavit said that the 211 unauthorised transfers amounted to a total sum of about HK\$322,345,743.00. He referred to the unauthorized transfers as the misappropriated funds. Mr Park went on to explain the manner in which upon the shipping company receiving remittances from the parent company, Mr Ma would select a specific bill/invoice and unlawfully transfer the exact amount to his own bank accounts whilst making a false entry in the computerized payment system of the parent company, its branches and group. The shipping company’s

allegation was that Mr Ma had covered up his unlawful acts over the years and that it was not until after Hong Kong International Terminal Ltd complained of outstanding invoices that the shipping company became aware of such matters.

On 4/3/2016 a report was made to the police of the crime alleged to have been committed by Mr Ma. Mr Ma was arrested by the police on the same day. He was subsequently charged with the offence of theft and was awaiting trial.

When dealing with the question of a real risk of dissipation of assets and the urgency for the grant of the *Mareva* injunction, Mr Park in his 1st affidavit said at para 21:

Misappropriation of funds by an employee is a serious crime. The conduct of Mr Ma has demonstrated a lack of probity, honesty and integrity over a long period of time with multiple acts of infringements. As disposed hereinabove, Mr Ma could have already dissipated part of the Misappropriated Funds by transferring the same to his girlfriend and friend(s). It is clear that Mr Ma had and has intention to dissipate the Misappropriated Funds beyond the trace.

There could be no doubt that the shipping company was alleging fraudulent conduct and dishonesty on the part of Mr Ma which led to Mr Ma being charged with the offence of theft.

On 18/3/2016 the *ex parte* order of Anthony Chan J was amended and continued until trial or further order by G Lam J. The amendments included increasing the value of assets restrained to HK\$334,686,208.00 and included moneys in further bank accounts and further landed properties.

On 26/8/2016 Deputy High Court Judge R Pang SC made an order re-amending the *Mareva* injunction. The value of assets restrained was further increased to HK\$387,655,303.70, and included moneys in further bank accounts in Hong Kong and also out of the jurisdiction in Shenzhen and Macau.

Mr Ma in his 4th affirmation made in opposition to the summons denied that the transfers he made to his bank accounts over the years in the total sum of over HK\$380,000,000 were made by him as alleged at para 8(4) of the ASC "without authority, knowledge, consent, cause and/or consideration". He said that all the transfers were made with the knowledge and consent on the part of his then superiors and were authorized. He said that after the funds were transferred to his accounts, they were eventually applied by him to settle bills and invoices from the relevant business counterparts of the parent company or the shipping company in accordance with payment instructions from them. Mr Ma had also denied that he made admissions to Mr Park and Mr Kim of having misappropriated the funds of the shipping company.

In his 6th affidavit, filed in reply to Mr Ma's 4th affirmation, Mr Park denied that the transfers made by Mr Ma to his bank accounts were authorized. It was clear that the shipping company discovered, on an analysis of the bank statements of Mr Ma's bank accounts supplied by the relevant banks, that the misappropriated funds had been primarily applied by Mr Ma in the following manner:

- (1) As to 26.31% in the sum of HK\$102,005,941.30, there were transfers to third parties whose identities are unknown to the shipping company;
- (2) As to 25.49% in the sum of HK\$98,832,084.44, there were credit card purchases and investments; and
- (3) As to 15.63% in the sum of HK\$60,609,534, there were purchases of landed properties.

Mr Park said in his 5th affidavit:

It is the case of the shipping company that Mr Ma had, on divers dates between 2009 to 2016, unlawfully and/or wrongfully transferred online money of the shipping company from the shipping company's Accounts a total sum of HK\$387,655,303.70 to Mr Ma's Accounts by way of 262 transactions.

It seemed to the Judge that the underlying allegation made by the shipping company in the action in question was that Mr Ma had stolen the misappropriated funds from the shipping company over the years. That was clearly an allegation of fraudulent conduct and dishonesty on the part of Mr Ma.

The Judge would also observe that in the action in question the shipping company also claimed, *inter alia*, restitution of the sum of HK\$25,173,817.88 on the ground of money had and received and/or unjust enrichment against Mr Ma's girlfriend.

In his 5th affidavit Mr Park said that on a perusal of the statements of Mr Ma's bank accounts with HSBC and Hang Seng Bank, the shipping company discovered that on divers dates from 2011 to 2016, Mr Ma transferred part of the misappropriated funds to accounts held by Mr Ma's girlfriend, his father and mother.

In his 5th affidavit, Mr Park said:

There was never any legitimate purpose for Mr Ma's girlfriend, his father and mother to receive such sums. Given the frequency, intervals and/or amounts of the transfers involved, Mr Ma's girlfriend, his father and mother were clearly dishonest and had no legitimate reason in receiving such sums. It is no doubt that the sums transferred by Mr Ma to his girlfriend, father and mother by way of the Suspicious Transfers were part of the money unlawfully and/or wrongfully transferred to Mr Ma's accounts from the shipping company's accounts. ...

The shipping company also discovered that landed properties in Australia and Macau were purchased in the name of Mr Ma's girlfriend. As to the purchase of these properties in the name of Mr Ma's girlfriend, Mr Park said that he verily believed that Mr Ma's girlfriend had had:

... knowingly and dishonestly assisted Mr Ma to dissipate and/or laundering the misappropriated funds out of jurisdiction

It seemed to the Judge that in the action in question the claim against, *inter alia*, Mr Ma's girlfriend was also based on an allegation of fraudulent conduct and dishonesty on her part.

The Judge would also refer to what was pleaded at para 11A of the ASC where it was alleged that on divers dates between 2011 and 2016, Mr Ma had wrongfully and unlawfully transferred part of the said sum of HK\$387,655,303.70 from his bank accounts to the bank accounts of his girlfriend, father and mother on multiple occasions whereby Mr Ma's girlfriend, his father and mother had:

... knowingly in receipt of and/or had dishonestly assisted in dealing with the said sum of part of the same.

Particulars of the knowledge and/or the dishonesty of Mr Ma's girlfriend, his father and mother were also provided at para 11A of the ASC.

In the Judge's judgment, the fraud exception under Order 14, rule 1(2)(b) of the RHC applied and the court had no jurisdiction to grant the shipping company summary judgment as claimed in the summons filed by the shipping company. The Judge dismissed the summons filed by the shipping company.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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